advantage of the lower rates.[56]

II. Terms and Conditions

A. The Cable Operator's Position that Terms and Conditions of Leased Access Should not be Established by the Commission is Contrary to the Plain Language of the Statute

Several cable operators urge that the Commission not establish reasonable terms and conditions, but rather leave terms and conditions to negotiations between the operators and programmers.[57] This approach is contrary to the language of the 1992 Cable Act, the Act's legislative history and the experience with leased access to date.

The plain language of the 1992 Cable Act mandates that the Commission establish reasonable terms and conditions. Subparagraph 612(c)(4)(A)(ii) gives the FCC authority to "establish reasonable terms and conditions" for commercial leased access.[58] Section 612(c)(4)(B) requires that "within 180 days after the date of enactment of this paragraph, the Commission shall establish rules . . .for establishing terms and conditions

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[56] CFA at n. 171.

[57] CRB at 66-67.

[58] 1992 Cable Act § 612(c)(4)(A)(ii), 47 U.S.C. § 532(c)(4)(A)(ii).

under subparagraph (A)(ii)."[59] When these two subparagraphs are read together, it is clear that the FCC must establish reasonable terms and conditions, and that it cannot leave the establishment of terms and conditions to negotiations between the cable operator and the lessees.

The legislative history of the 1992 Cable Act further supports the proposition that Congress intended the FCC to affirmatively establish reasonable terms and conditions, rather than rely on cable operators and lessees to negotiate terms and conditions. The Senate Report attributes the failure of the 1984 Act, in part to the need for the programmer

> [T]o negotiate many elements -- a reasonable rate for access and then for billing and collection and then reach an agreement on key terms and conditions, for example, tier and channel location.[60]

The Report goes on to note that the Commission:

> <u>[S]hall establish</u> reasonable terms and conditions of access. By involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels.[61]

Negotiation cannot be relied on as a means of arriving at reasonable terms and conditions because of the inequality of bargaining power between lessees and cable operators. Would-be program lessees have no good substitutes for leased access channels -- especially if they want to lease an entire channel.

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[59] 1992 Cable Act § 612(c)(4)(B), 47 U.S.C. § 532(c)(4)(B).

[60] 1991 Senate Report at 31-32.

[61] <u>Id.</u> at 32 (emphasis added).

Cable operators, however, can use the channels for their own purposes until an agreement to lease the channel is reached.[62] The cable operator's ability to use unleased channels, combined with the fact that lessees compete with the cable operator's affiliated programming for viewers, mean that cable operators have little incentive to negotiate reasonable terms and conditions.

Experience has shown that negotiation has not worked. In the eight years between the 1984 Act and the 1992 Act, negotiation failed to result in significant leased access. The House Report found that:

> [T]he principal reason for [the failure of leased access] is that the Cable Act empowered cable operators to establish the price and conditions for use of leased access channels. . . . The FCC stated in the FCC Cable Report . . . that some cable operators have established unreasonable terms, or in some cases, simply refused to discuss the issue of leased access with potential lessees. The Committee is concerned that cable operators have financial incentives to refuse leased access channel capacity to programmers whose services may compete with services already carried on the cable system, especially when the cable operator has a financial interest in the programming services it carries.[63]

Similarly, the Senate Report found that leaving cable operators to establish the terms and conditions had resulted in the denial of access.[64]

Finally, if there is any doubt that cable operators would

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[62] 1984 Cable Act § 612(b)(3).

[63] 1992 House Report at 39.

[64] 1991 Senate Report at 31 (quoting testimony of Preston Padden).

attempt to impose unreasonable terms and conditions on lessees, that doubt is dispelled by the proposals made in the comments in this proceeding. For example, some cable operators want to require payment of the full amount in advance for use of access channels.[65] To require a prepayment of the full amount of the use of the channel is unreasonable. This is the equivalent of requiring a renter to pay the full amount of a lease up-front. While CME does not object to requiring a reasonable advance payment or bond, to require the full amount or an unreasonably high deposit creates a barrier to entry and defeats the purpose of the leased access provision.

Another unreasonable condition urged by some cable operator is that "cable operators should be permitted to require higher technical quality than what is accepted for PEG channels."[66] This requirement is unnecessary. If a channel is beset by technical difficulties, no one will watch it. Thus, this is an instance in which the marketplace can be relied on to regulate the quality of programming.

Moreover, higher technical standards can be used to defeat the Congressional goal of increasing the use of leased access. High technical standards would serve as a barrier to entry, in particular for non-profit programmers that cannot afford the

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[65] CIC at 48.

[66] Continental at 85.

equipment necessary to meet the higher technical standard.[67]

III. Dispute Resolution

A. The Special Relief Provisions Recommended by the Cable Operators are not Expeditious Enough

The cable operators do not support the NPRM's proposal for expediting dispute resolution, and instead recommend utilizing the cable television special relief procedures available under 47 C.F.R. § 76.7.[68] CME does not believe that the existing special relief procedures set forth in Section 76.7 are suitable for disputes involving leased access. The response time allowed under Section 76.7 totals 50 days (30 days for opposition and 20 days for reply) compared to the 10 to 15 day response time proposed in the NPRM. Thus, the effect of adopting the cable operators' proposal would be to delay access.

Cable operators further oppose the implementation of oral rulings in emergency situations. For example, TCI and Time Warner assert "[i]t is frankly difficult to conceive of what situations involving leased access programming would require 'emergency treatment.' We can think of none."[69] We think they lack imagination. It is easy to think of situations where time is of the essence: a political candidate seeking to present his or her views to the public; a live concert; a sporting event; and a holiday special are just a few examples of programs that

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[67] See NATOA at 94.

[68] 47 C.F.R § 76.7 (1992); Continental at 87; TCI at 77.

[69] TCI at 79; Time-Warner at 105.

could become stale if disputes over access are not resolved quickly.

In addition to oral rulings, access at the user's terms and conditions should be granted if the Commission fails to resolve a dispute in 30 days. The cable operators oppose such a provision, stating that there is no need for requiring access prior to a Commission decision.[70] If access is permitted, however, the cable operators' contend that it should be at the operator's terms and conditions. Without access at the user's terms and conditions, the cable operators have an incentive to delay, and no incentive to negotiate.[71] Establishment of an escrow account or reasonable bond would shield the operators from financial risk in such situations.

CME also supports the use of Alternative Dispute Resolution (ADR) to resolve conflicts concerning leased access.[72] Use of ADR could expedite dispute resolution, as well as lessen the demands on the Commission's resources and the parties' resources that would result from a traditional administrative proceeding. Since ADR is consensual, if one party had reservations, ADR would not be undertaken.

IV. Other Points Requiring Reply

A. Reporting Requirements are Essential for Regular Evaluation of Commercial Leased Access.

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[70] Continental at 89.

[71] Id.

[72] See Comments of the Dispute Resolution Group.

Some cable operators argue that the Commission can assess any implementation problems with leased access simply by monitoring complaints on a regular basis. For example, TCI states: "it is premature to adopt an elaborate reporting system, which would only add to the regulatory burdens and costs of cable companies imposed by the Act."[73]

A reporting requirement, however, would not impose significant burdens on cable operators. Moreover, a reporting requirement is the only way to ensure that Congress' goals for leased access are fulfilled. In the past, the complaint procedure has not provided an effective means of monitoring leased access use.[74] Even with a streamlined complaint procedure, monitoring complaints does not provide the information critical for evaluating whether leased access is working, e.g., the percent of leased access capacity being used, the amount of leased access be non-profits. Finally, it is not correct to infer from the absence of complaints that leased access is effective. Certain types of users might never file complaints. As emphasized by CFA, "[i]t is likely that the non-profit

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[73] TCI at 77 n.45.

[74] For example, even though there is widespread acknowledgment that leased access has not worked well, few complaints were filed in the District Courts. This is because the process was so stacked against the Complainant that it was not worth filing a complaint. Donna N. Lampert, Cable Television Leased Access, A Report of the Annenberg Washington Program, Communications Policy Studies, Northwestern University, at 4. Since the Commission has not yet adopted dispute resolution procedures, it is too soon to tell whether the presence or absence of complaints is meaningful.

programmer with limited resources may not be able to file and pursue a complaint against a cable operator."[75]

B. The Waiver Exception Suggested by the Cable Operators in Hardship Situations Would Violate the Act.

Some cable operators recommend a provision that would waive the requirement of leased access for operators experiencing financial hardship. For example, CIC states: "Though not discussed in the Notice, there may be situations where enforcement of the Commission's leased access rules will create a hardship for the operator and subscribers. The Commission should provide for a waiver of the rules or some other form of special relief."[76]

Not only is such a proposal beyond the scope of the Notice, but the Commission lacks any authority to provide for such a waiver. Section 612(b)(1) mandates that a certain percentage of channels must be set aside for leased access.[77] Section 612(b)(3) further permits cable operators to use channels set aside if there is no demand for leased access.[78] The clear

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[75] CFA at 155.

[76] CIC at 49, Cox at 45.

[77] 1992 Cable Act § 612(b)(1), 47 U.S.C. § 532(b)(1) (36-to-54 channel system to designate ten percent of channels not otherwise required for use by federal law or regulation; 55-to-100 channel system to designate 15 percent of channels not otherwise required for use by federal law or regulation; over-100 channel system to designate 15 percent of all channels).

[78] 1984 Cable Act § 612(b)(3), 47 U.S.C. § 532(b)(3), "A cable operator may use any unused channel capacity designated pursuant to this section until the use of such channel capacity is obtained, pursuant to a written agreement, by a person unaffiliated with the operator."

implication of this provision is that when there is demand for leased access, the cable operator must relinquish its own use.[79] Congress did not provide for a waiver of the requirement that cable systems offer leased access, and the Commission has no authority to grant any.

CONCLUSION

CME urges the Commission to reject the unreasonable comments of the cable operators and to implement the leased access provisions so as to provide a genuine outlet for diverse programming as Congress intended.

Respectfully submitted,

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February 11, 1993

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[79] 1984 Cable Act § 612(b)(1)(E), 47 U.S.C. § 532(b)(1)(E). "An operator of any cable system in operation on October 30, 1984, shall not be required to remove any service actually being provided on July 1, 1984, in order to comply with this section, but shall make channel capacity available for commercial use as such capacity becomes available until such time as the cable operator is in full compliance with this section."

January 22, 1992

Ms. Donna Searcy, Secretary
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

Dear Ms. Searcy:

The Federal Communications Commission has requested public comment on whether it should establish preferential leased access channel rates for non-profit programmers (NPRM paragraph 153.) California Newsreel would like to encourage the FCC to insure that leased access channels will be available for non-profit purposes by establishing such preferential rates.

As we are swept into a new telecommunications era, it is imperative that non-profit organizations have equal access to these new technological opportunities. More than 150 years ago, Alexis de Tocqueville remarked that what made American democracy unique and vigorous was the proliferation of non profit, voluntary associations. More recently, in Eastern Europe, the importance of a Civic Sector, non-commercial and non-governmental has been emphasized. In this country, the need for a strong infrastructure to support economic growth has again emphesized the vital contribution of the non-profit sector to our nation's formal and information education.

Just as it has long been government policy to support non-profit organizations through non-profit postal rates and tax-exemptions, special provisions must be made to insure that a vigorous non-profit sector can survive and flourish in the Information Age. Preferential leased access channel rates are a bold and necessary step towards allowing non-profit institutions to explore the full potential of new telecommunications technologies for providing diverse, public service programming.

I am Director of California Newsreel, a non-profit, tax-exempt organizations which for more than 25 years has distributed educational films and videos to high schools, colleges and public libraries. During these years, we have focused on releasing culturally diverse educational material whose markets are too small or too nascent to interest commercial distributors.

We are now eager to carry this work into the Fiber Optic Age by establishing new non-profit networks and local channels which can address a number of unmet communications needs. The era of cable abundance can now definitively be said to have provided more choice than diversity. Amazingly, there are still no national program services devoted to such topics as creative aging, recovery, bi-lingual education and ESL, "ready to work," etc. PBS' focus on attracting members and underwriting support has prevented it from meeting the needs of many under-served audiences. One is particularly struck by the lack of consistent programming for America's increasingly multi-cultural population.

The emergence of these new alternative services will depend on the their ability to gain access to channels at affordable rates. California Newsreel and other

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non-profit agencies exist precisely to provide public services which are not commercially viable and which therefore cannot be asked to compete with commercial ventures for limited channel capacity. Congress mandated "leased access" to insure a diversity of information for a diverse public. True diversity cannot be achieved if it restricted to diversity among the only commercially viable. Leased access, like the rest of the expanding telecommunications universe, must have space reserved for important non-commercial, public service objectives as well. Therefore, I encourage the FCC to establish these essential preferential leased access rates for non-profit programmers.

Yours sincerely,

Lawrence Daressa

Lawrence Daressa
Director

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Ms. Donna Searcy, Secretary
Federal Communications Commission
1919 M Street, NW
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RE: Comments on MM Docket 92-266
January 14, 1992

Dear Ms. Searcy,

The FCC has requested comment on whether it should establish preferential leased access channel rates for not-for-profit programmers. The Video Data Bank urges the FCC to set preferential rates for those organizations that have been created to produce and support alternative media sources.

As a producer and distributor of non-commercial independent video productions, the Video Data Bank is a part of a large network of organizations and collectives formed around the principle of making the advances of our technological age serve the needs of everyone. Regulating costs for leased access channels would be an important step towards democratizing access to television.

Commercial networks are incapable of including the voices of local ideas and information, and never presents the voices of under-served communitities. Not-for-profit and local organizations are uniquely capable of meeting these needs.

Congress mandated "leased access" channels would allow for the expansion of diverse cultural, educational and informational programming. The FCC, in proposing to grant special rates for the organizations that serve the people that the commercial networks can't, is making a neccessary and timely stance on advocating diversity and democracy in our sources of television. Thank you.

Sincerely,

Kate Horsfield

Kate Horsfield
Executive Director
Video Data Bank

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